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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1032

PRESTON DIAL and BILLY H. CUNNINGHAM,
Appellants

v.

RICHARD FONTAINE,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Jurisdictional Statement

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v.

RICHARD FONTAINE,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Jurisdictional Statement

Appellants appeal from the judgment of the United States Three-Judge District Court for the Western District of Texas, entered on October 10, 1969, holding that the procedures utilized by Appellants in seizing certain motion picture films were unconstitutional and that Appellants were enjoined from retaining possession of the seized materials and from utilizing Section 6, Article 527, Texas Penal Code (the Texas Obscenity Statute), unless a prior adversary hearing is held.

OPINION DELIVERED IN COURT BELOW

The court below, the United States Three-Judge District Court for the Western District of Texas, entered an opinion in Civil Action No. SA69CA136 on August 5, 1969. The opinion held that the procedure of obtaining search warrants

and seizing motion pictures after ex parte judicial determination of probable cause was constitutionally deficient, but did not grant injunctive relief to the Plaintiff/Appellee. The opinion is reported at 303 F. Supp. 436, and a copy is attached hereto as Appendix A. The judgment of the court below, entered on October 10, 1969, also held the procedures used to be unconstitutional and further enjoined Appellants from retaining possession of the films and further use of Section 6, Article 527, Texas Penal Code, without a prior adversary hearing. A copy of the judgment is attached hereto as Appendix B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This suit in the court below sought a declaratory judgment that Article 527, Texas Penal Code, was unconstitutional on its face or as applied and sought an injunction against Defendant/Appellants, who were State officers, from retaining possession of seized motion pictures and any further such seizures. The suit was brought pursuant to 28 U.S.C., Sections 1331, 1332, 1343(3), 1343(4), 2201, 2281, 2284, and 42 U.S.C., Section 1983.

Final judgment granting a permanent injunction was entered on October 10, 1969, for which judgment review is sought. Notice of appeal was filed November 6, 1969, with the clerk of the United States District Court for the Western District of Texas.

The Supreme Court of the United States has jurisdiction of this appeal by virtue of 28 U.S.C. Section 1253 and Section 2101(b).

Cases believed to sustain jurisdiction are: *U.S. v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobson*, 362 U. S. 73 (1960).

The validity of Article 527, Texas Penal Code, as last amended by Section 1, Chapter 461, Acts of the 57th Legislature, Regular Session, 1961, is here involved. Pertinent portions of that statute as it was in effect at all material times is quoted herewith:

> Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions
>
> Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
>
> . . . .
>
> Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

1. Is an adversary hearing always required before the seizure of written or printed matter, including motion picture films?

2. Is a procedure, whereby a judicial officer receives a sworn, detailed description of a motion picture, makes an independent finding of probable cause of obscenity and issues a search warrant for specifically named motion picture films, and the State requests an adversary hearing immediately after the seizure, such a procedure to adequately assure non-obscene material the constitutional protection to which it is entitled?

STATEMENT OF THE CASE

Appellee was the manager of the Joy Theater in San Antonio, Bexar County, Texas, and was engaged in the public commerical exhibition and display of motion pictures to persons over the age of 18. Appellant Preston Dial is the First Assistant District Attorney for Bexar County, and Appellant Billy H. Cunningham is a District Attorney Investigator. On three occasions Appellants seized films from Appellee by virtue of search warrants. In each instance Dial viewed the film and then appeared before a judge with an affidavit and other sworn testimony, describing the persons and events portrayed in the motion picture in detail. No conclusory assertions were made. The judge then made his own independent determination of probable cause for obscenity and issued a specific warrant to search for and seize the particular motion pictures which had been described to him. The warrants were executed by Cunningham, and no movies were seized other than those described in the warrants. The only judicial determination on the issue of obscenity before the seizure was the *ex parte* hearing before the various judges. No adversary hearing was requested or held prior to the seizure; however, in each case an adversary hearing was requested by Appellants to be held immediately after the seizure, and in each instance the Appellee requested an indefinite postponement of the hear-

ing. The purpose of the seizures was not for destruction but as evidence for criminal prosecutions. Charges were filed against Appellee for exhibiting obscene motion picture films, a violation of Article 527, Penal Code of Texas. Such charges were pending at the time of filing of this suit by Appellant. This action, seeking an injunction and declaratory judgment, was filed in the United States District Court for the Western District of Texas. Thru pre-trial procedures Appellants and Appellee narrowed the issues, and the Three-Judge District Court, in a hearing held on July 18, 1969, on undisputed facts, considered only the single issue of whether or not an adversary hearing must be held before motion picture films may be seized by search warrant. It may be assumed for the purposes of this case that the search warrants themselves were without constitutional imperfections. Likewise, the issue of the actual obscene nature of the films is not reached. On August 5, 1969, the Court entered the opinion referred to above which is attached as Appendix A. On October 10, 1969, the Court entered its judgment for the Plaintiff/Appellee, a copy of which is attached as Appendix B.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Since much of the argument and most of the cases apply to both questions, they will be presented and argued together.

Questions 1 and 2

1. Is an adversary hearing always required before the seizure of written or printed matter, including motion picture films?

2. Is a procedure, whereby a judicial officer receives a sworn, detailed description of a motion picture, makes an independent finding of probable cause of obscenity and issues a search warrant for specifically named motion picture films, and the State requests an adversary hearing immediately after the seizure, such a procedure to adequately assure non-obscene material the constitutional protection to which it is entitled?

This case presents for determination a question of law that has been plaguing judges and prosecutors charged with the responsibility of enforcing obscenity laws since its allusion in *Quantity of Books v. Kansas*, 378 U.S. 205 (1964). That question is whether or not a prior adversary hearing is a mandatory constitutional pre-requisite to seizure of obscene material, or is it merely one of the possible procedures that can be adopted to focus searchingly on the question of obscenity and assure nonobscene material the constitutional protection to which it is entitled. *Marcus v. Search Warrants*, 367 U.S. 717 (1961). To put the case in perspective, it might be well to point out several facts that distinguish it from other situations where efforts to combat obscenity dissemination fell guilty of faulty procedure.

This case does not envolve mass seizures as in *Marcus*, *Quantity of Books* or *Metzger v. Pearcy*, 393 F. 2d 202 (7th Cir. 1968). It envolves instead an effort to seize one copy of a specific motion picture film, which copy was being exhibited in San Antonio, Texas, on the day the particular search warrant was issued. It is not a case of an attempt to seize publications civilly for destruction as in *Marcus* and *Quantity* but rather an effort to gather a particular item of evidence to be used in a later criminal trial for the conduct of the individual or individuals responsible for the exhibition, and to preserve this item of evidence in its

status quo as permitted in *Freedman v. Maryland*, 380 U.S. 51 (1965).

Neither is this a case where a search warrant was issued on the conclusory assertions of a police officer as in *Marcus, Lee Art Theater v. Virginia*, 392 U.S. 636 (1968), or *Cambist Films v. Tribell*, 293 F. Supp. 407 (D.C. Ky., 1968). Here the films were described in detail, both in the affidavits presented to the judges and in additional sworn testimony, and the judge then drew his own independent conclusions. The warrants issued were not general warrants as in *Marcus* but described each film with particularity, and they did not permit the executing officer to decide which films he thought he should seize.

This is not a case of a long delay before a final judicial determination of obscenity as is *Marcus* and *Freedman*. Here the officers were operating under the applicable sections of the Texas Code of Criminal Procedure which required forthwith and immediate steps to an adversary hearing.

Art. 18.14 (317) (368) (356) Warrant executed without delay

> Any peace officer to whom a search warrant is delivered shall execute it without delay and *forthwith return it* to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period if so directed in the warrant by the magistrate.

Art. 18.19 (322) (373) (361) Shall seize accused and property

> When the property, implements, arms or munitions which the officer is directed to search for and seize are found, he shall take possession of the same, and carry them before the magistrate. He shall also arrest any person whom he is directed to arrest by

the warrant, and *immediately* take such person before the magistrate.

Art. 18.25 (328) (379) (367) Magistrate shall investigate

The magistrate, *upon the return of a search warrant, shall proceed* to try the questions arising upon the same, and shall take testimony as in other examinations before him.

Art. 18.26 (329) (380) (368) Shall discharge defendant

If the magistrate be not satisfied, upon investigation, that there was good ground for the issuance of the warrant, he shall discharge the defendant, and order restitution of the property taken from him, except implements which appear to be designed for forging, counterfeiting, or burglary. In such case, the implements shall be kept by the sheriff subject to the order of the proper court. (Emphasis added.)

These statutes assure that a prompt judicial determination of the issue of obscenity and all other issues will be available as required by *Freedman*. The burden of instituting these proceedings is not on the defendant. In our case, the State on each occasion requested an immediate hearing only to have it postponed indefinitely at the request of Appellee. If the hearings had been held, the burden of proof on the issue of obscenity, as well as all other issues in a Texas criminal trial, would have been on the State. We feel that this complies with the full procedural safeguards set out in *Freedman*.

We further submit that the totality of this procedure gives adequate safeguards to assure nonobscene material appropriate constitutional protection. The key to the procedure is the pre-seizure independent *judicial* determination of obscenity, though *ex parte*, and the assurance of an immediate adversary hearing after seizure. There are then these two steps, each of which is designed to focus

searchingly on the issue of obscenity which is the mandate of *Marcus*. Since prior restraint has been approved by the Supreme Court if adequate safeguards are present, *Near v. Minn.*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), *Freedman v. Maryland*, (supra), the procedure followed by Appellants herein should likewise be approved as equally effective as the device of a prior adversary hearing. It is difficult to see how any difference in the two procedures can grow to a constitutional issue. We feel it is more of a case of lower courts limiting the State in resorting to various weapons in the armory of the law, which this Court has said should not be done. *Kingsley* at page 441.

It is our contention that the question is still open as to whether there is Supreme Court authority for a mandatory prior adversary hearing on obscenity seizures generally. It is our further contention that there is no Supreme Court authority requiring a prior adversary hearing where motion pictures are concerned. It is the way in which such a requirement was born of misinterpretation and has been able to grow and fester until it is becoming a part of our jurisprudence that makes this case of such import as to require plenary consideration.

Four members of this Court in *Quantity of Books v. Kansas* held that a civil seizure of books preliminary to a hearing for their destruction was constitutionally deficient because no prior adversary hearing was afforded. One member of the Court concurred in the judgment of reversal only because the books were not hard-core pornography. Two members of the Court concurred because they felt all books have First Amendment protection. Two members of the Court dissented in the judgment. The result is what is known as a "no clear majority decision", and as such

prevents it from being an authoritative determination for other cases. *U.S. v. Pink*, 315 U.S. 203 (1942). Nevertheless, misinterpretations of *Quantity of Books* by failing to distinguish it as an attempt at a mass seizure and destruction of books from a criminal trial and evidence of a course of conduct and erroneously viewing it as binding precedent has resulted in confusion and chaos in this area of the law.

Metzger v. Percy, 393 F. 2d 202 (6th Cir. 1968) one of the first cases to follow the "no-majority rule" in *Quantity* had the imperfection of a mass seizure of four prints of one motion picture without warrants. The courts discussed *Quantity of Books*, noting, "In that case, only four Justices joined in the opinion of the Court", but went on to say, "However, we feel that we are bound by the opinion of the Supreme Court in *Books*." Without further explanation the Court said, "In light of *Burstyn*, supra, *Kingsley Pictures*, supra and *Jacobellis*, supra these rules (prior adversary hearing) apply to motion picturers as well." These three cases had been cited as correct authority that motion pictures are protected by the constitutional guaranties of free speech, but they are definitely not authority that seizure of movies require a prior adversary hearing. *Kingsley*, on the contrary, is a leading case for permissible prior restraint of motion pictures. Nevertheless, the leak in the dike of *Quantity* grew to a flood with *Metzger*.

Metzger was followed by *Cambist Films v. Illinois*, 292 F. Supp. 185 (D.C. Ill. 1968) where the court cited *Quantity* and *Metzger* and grew bolder in its assertion that, "*It is well established* that prior to suppression by law enforcement officials of allegedly obscene material there must be an adversary hearing on the question of obscenity (Emphasis added)". This was followed by *Cambist Films v. Tribell*,

293 F. Supp. 407 (D.C. Ky. 1968) which now could cite *Quantity, Metzger* and *Cambist v. Ill.* through it appeared to decide the case on a conclusory warrant.

Tyrone v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) was the second United States Court of Appeals to follow the four-Justice decision in *Quantity of Books*. The court said it found support in *Metzger v. Pearcy* and believed that the adversary hearing requirement applies to motion pictures. It was hoped that this case could have been a vehicle to obtain a clear pronouncement by the Supreme Court on this issue; however, on Dec. 15, 1969, review was denied by the Supreme Court in this case and in its companion case. The need for plenary consideration of our present case is magnified.

Other recent cases following the Metzger rule are: *Sayles v. Graham*, No. Civ. 69-81 Phx, D.C. Ariz., Mar. 17, 1969; *Delta Book v. Cronvich*, No. 68-1927, D.C., E.D. La., July 14, 1969 (which amazingly held that a prior adversary hearing was even required for books which had been purchased by the State); *Central Agency v. Brown*, No. 13,023, D.C.N.D. Ga., Aug. 26, 1969.

In opposition to this line of cases are all the prior restraint cases cited above (*Near, Times Film, Kingsley, Freedman*) most of which envolve motion pictures as well as the generally accepted practice of prior restraint in federal customs cases, *U.S. v. 56 Cartons of Magazines*, 373 F.2d 635 (4th Cir. 1967); *U.S. v. "491"*, 367 F.2d 889 (2nd Cir. 1966). None of these require the prior adversary hearing before some sort of restraint is placed on motion pictures.

Stein v. Batchelor, Civ. Action 3-2951-B. D.C.N.D. Tex., June 9, 1969, held the Texas statute unconstitutional but

said that *Marcus*, *Quantity* and *Freedman* do not make the prior hearing mandatory.

A number of cases give particular fact situations where it is felt the prior adversary hearing is unnecessary. The Supreme Court of Pennsylvania in *Penn. v. Guild Theater*, 248 A.2d 45, (1968) recognized that a prompt hearing and a prompt decision after seizure could obviate the necessity for such hearing and pointed out this was the teaching of *Freedman* and *Kingsley*. *Rage Books v. Leary*, 301 F. Supp. 547 (D.C.N.Y.) distinguished *Quantity of Books* by saying that "an arrest and an accompanying seizure of *specimens only* of the allegedly obscene materials are another matter entirely. No decision has thus far prohibited the normal police function of effecting an arrest and the seizure of sample evidence of a suspected crime." This case points up the very impractical aspects of requiring an adversary hearing. Police and prosecutors are constantly faced with the situation of the pornographer who sells "dirty pictures" to the children in the park. Does *Quantity of Books* say that this man cannot be arrested on the spot and the pictures seized as evidence? If that is not done, then by what stretch of the imagination can he be expected to appear for an adversary hearing so that some day in the future he might be prosecuted. A similar situation arises where an individual or group sells tickets to a "stag party" at which movies are to be shown and a police officer attends the showing. Does the constitution prevent him from making an arrest or does it prevent him from calling another officer to obtain a search warrant to seize the film? If the officer does not act quickly in each case, it is obvious there will be no evidence and therefore no case.

See *Alexander v. Zimpfer*, No. 4-69 Civ. 405 D.C. Minn. where the court approved the seizure of 8 millimeter "stag"

films without a prior adversary hearing as there was no other practical way to obtain the evidence. This case is on appeal to the Court of Appeals for the Eighth Circuit.

The commercial movies are little different. They do show the same film for several days usually, and an opportunity would be present to obtain some type of notice for a hearing, but again the movies are highly transportable items. They come in shipping containers with handles and labels, and when the exhibitor displays a film that he knows is legally objectionable, if he is alerted to the fact that legal action is about to be taken, the evidence will be gone prior to the prior adversary hearing. A book or magazine may be purchased by an officer without any seizure, but a motion picture cannot.

The contention of Appellants in this case can best be summed up by quoting from Judge McLean's recent opinion in *Cinema v. Vergari*, 5 CrL 2395 (USDC, SNY, Aug. 8, 1969).

> We thus have a case in which the films that form the basis of the first indictment and those which presumably will be the basis of the second, were observed before they were seized, not only by the prosecutor, but also by a judge, who found them to be obscene. It is true that the observation was at a regularly scheduled performance in the Capitol Theater, not in an adversary judicial proceeding in court. It is hard to see how it would have been practical to arrange such a judicial hearing prior to seizure. By the time a hearing could be held after due notice to Steinberg, it is probable that the films would no longer be in his possession* * *.
>
> In a prosecution for obscenity, the best evidence as to whether or not a picture is obscene is the picture itself. Without it the prosecution of Stein-

berg will be seriously handicapped, if not rendered impossible. • • •

We are not dealing here with wholesale massive seizure. We are not concerned here with books or magazines, but with motion pictures. It is less practicable to hold a preliminary judicial adversary hearing with respect to motion pictures than it is with respect to books and magazines. Most important, the procedure followed here was far more conducive to safeguarding the protection of nonobscene material than was the procedure in (*Marcus, Quantity of Books* and *Lee Art*) • • • • This conclusion is contrary to that reached by the Seventh Circuit in *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968) and in a district court decision in that circuit, *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968). In my opinion those decisions placed undue emphasis upon the language rather than the actual holding of *A Quantity of Books*. Those decisions are not binding on me and I decline to follow them.

This case is an excellent example of the complete divergence of application of the law in different jurisdictions because of the lack of a clear pronouncement from the Supreme Court. There are many more public officials who are faced with an enforcement problem in their community but do not know which way to turn.

CONCLUSION

Jurisdiction of this case is clear, and the questions presented are of such import and are so substantial as to require plenary consideration.

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CERTIFICATE OF SERVICE

I, Preston H. Dial, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Jurisdictional Statement has been served on counsel for the Appellee by depositing same in the United States Mail, postage prepaid, addressed to Mr. Frierson M. Graves, Jr., First National Bank Building, Memphis, Tennessee 38103 and Mr. Frederick Shannon, 1540 Milam Building, San Antonio, Texas 78205, this 23 day of January, 1970.

Preston H. Dial, Jr.

PRESTON H. DIAL, JR.
1st Assistant Criminal District Atty.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICHARD FONTAINE

V.

PRESTON DIAL and BILLY CUNNINGHAM

CIVIL ACTION NO. SA69CA136

OPINION

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Before THORNBERRY, Circuit Judge, SPEARS, Chief District Judge, and SUTTLE, District Judge.

SPEARS, Chief District Judge:

Plaintiff is the manager of the Joy Theatre which engages in the rental and exhibition of motion picture film in San Antonio. Defendants Dial and Cunningham are, respectively, an assistant district attorney of Bexar County, and an investigator in the district attorney's office.

On May 6, 1969, a search warrant directing the seizure of specifically named motion picture film, trailers, and posters from the premises of the Joy Theatre was executed

by defendants, and the named items were seized for use as evidence in an anticipated criminal prosecution against plaintiff for the violation of Article 527 of the Texas Penal Code[1], which prohibited the knowing exhibition of obscene motion picture film and picture. The search warrant was issued upon the affidavit and other sworn testimony of defendant Dial, describing the persons and events portrayed by the motion picture film, and thus not upon mere conclusory statements that the motion picture film was obscene. However, the warrant was issued by the magistrate without holding an adversary hearing on the issue of obscenity, and no such hearing was requested by defendants prior to the seizure[2].

The pleadings, stipulations, proposed conclusions of law, and representations made by counsel at the pretrial conference, support the recitation in the pretrial order signed by counsel for all parties, and approved by the Court, that this case involves only one contested issue of law, that is, "whether or not the Constitution of the United States requires that an adversary hearing to determine the question of obscenity must be held prior to the seizure of allegedly obscene motion picture film, and the advertisements thereof". As a consequence, we will not consider other possible questions, or undertake to make a determination concerning the obscenity or nonobscenity of the film seized from plaintiff.

It is plaintiff's contention that because of the absence of a prior adversary hearing on the issue of obscenity, the seizure of the motion picture film and other items constitutes an unreasonable search and seizure in violation of the First, Fourth and Fourteenth Amendments. Defendants, on the other hand, contend that plaintiff was afforded adequate procedural safeguards, particularly since immedi-

ately after the seizure defendants requested an adversary hearing on the issue of obscenity, which, however, was postponed by the State judge, at plaintiff's request, until the conclusion of this litigation.

Since plaintiff seeks injunctive relief against the defendants as state officers, this Court has jurisdiction of the controversy under 28 U.S.C.A. §2281. See *Query v. United States*, 316 U.S. 486, 490 (1924); and *Ex Parte Bransford*, 310 U.S. 354, 361, (1940). 2A

The starting point with respect to plaintiff's contention that the failure to afford him a prior adversary hearing renders the seizure unconstitutional, is the Supreme Court case of *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964). There the seizure by the Kansas Attorney General, pursuant to a search warrant, of allegedly obscene books, was held to violate the Fourteenth Amendment. Four of the justices were of the opinion that the owners of the books were constitutionally entitled to an adversary hearing on the issue of obscenity prior to the seizure of the books, 378 U.S. at 210-11, and two other justices concurred in the judgment without finding it necessary to consider the procedural questions. *Id.* at 213-14. Although that case was concerned with the seizure of books for subsequent destruction after a finding of obscenity, the rationale of the four justices has been held by other courts to apply with equal force to the seizure of motion picture film for subsequent use as evidence in criminal obscenity prosecutions. *Tyrone, Inc. v. James B. Wilkinson*, No. 13,192; F.2d (4th Cir. 1969, affirming 294 F. Supp. 1330 (E.D. Va. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968); *Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968); *Sayles V. Graham*,

No. 69-81-Phx., F. Supp. (D. Ariz. 1969).

In view of the foregoing authorities, this Court holds that the procedures followed by defendants in obtaining the search warrant, and in seizing the motion picture film after merely an *ex parte* judicial determination of probable cause, were constitutionally deficient. [3]

The states are constitutionally required to use sensitive procedural tools for separating protected expression from that narrowly defined class of expression called obscenity, which is not protected by the First Amendment. See *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The seizure of film after no more than an *ex parte* determination of probable cause is essentially a prior restraint of expression — especially inimicable to the First Amendment — and clearly lacks the sensitivity required by the Constitution. In fact, any procedure less sensitive than an adversary hearing on the issue of obscenity prior to seizure of the film, fails to meet the constitutional requirements implicit in the First, Fourth, and Fourteenth Amendments.

While it is not for this Court to determine what procedure the State of Texas might find most useful in effectuating its public policy against the distribution or display of obscene motion picture film, it is not improper to suggest that there are a number of possible procedures which might be effectively utilized. For example, Texas law now provides for the issuance of injunctions after adversary hearings to prevent violations of the State's obscenity statute[4]. In facilitating the enforcement of criminal sanctions, the State might choose either to enact special procedures[5] or to adopt well-known and established procedures[6] that would insure the safeguard of an adversary hearing prior to seizure of allegedly obscene film.

The procedures defendants used in seizing the motion picture film, trailers, and display posters as evidence for

future criminal prosecutions against plaintiff under Article 527, are hereby declared unconstitutional, and defendants are ordered to return the seized materials to plaintiff. In addition, defendants are prohibited from utilizing the provisions of Section 6 of said statute, unless a prior adversary hearing is afforded the party against whom "any . . . writs and processes", including, but not limited to, search warrants, "appropriate to carry out and enforce . . . this Act", are sought[7].

Inasmuch as defendants have represented in open Court that they will abide by any final decision reached herein, it is not deemed necessary at this time to grant injunctive relief to the plaintiff. However, in the event this judgment is not complied with in good faith, this Court will entertain a further request for such relief.

There having been no allegation of bad faith on the part of defendants in such seizures, this Court will not interfere in any manner with any criminal prosecutions that might be based upon plaintiff's having displayed the seized film.

It is so ORDERED.

Dated August 5, 1969.

ADRIAN A. SPEARS

Chief United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each judge to so act.

1/ Sections 1, 3 and 6 of Article 527 of Vernon's Annotated Texas Penal Code, before its amendment effective June 10, 1969, provided as follows:

> Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, case, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
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> Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.
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> Section 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

Article 527 was a portion of the amendatory Act of 1955, as amended by the amendatory Act of 1957. Section 4 of the 1955 Act and section 3 of the 1957 Act were severability clauses providing that partial invalidity should not affect remaining portions of the Acts. See Texas Penal Code, Art. 527 (supp. 1969) (historical note).

2/ Similar search warrants were also executed and seizures were made from plaintiff on May 26 and June 5, 1969.

2a/ Compare Rodriguez v. Brown, ___ F. Supp. ___ (W.D. Tex. 1969), in which a three-judge court, citing Bailey v. Patterson, 369 U.S. 31 (1962), held the case a one-judge, not a three-judge matter, on the ground that the claim of unconstitutionality was obviously wihout merit and insubstantial.

3/ In the recent case of Stein v. Batchelor, CA-3-2951B, ___ F. Supp. ___ (N.D. Tex. 1969), it was stated that the absence of a provision for a prior adversary hearing in Section 6 did not invalidate the statute, but since the Court's comments resulted from a contention made by **amicus curiae**, it

is not clear whether that issue was actually in the case or not. The Court did hold, however, without question, that Section 1 of the statute "as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination" of obscene materials, and that Section 3 is unconstitutional because the definition of the word **obscene** fails to include the words "utterly without redeeming social value". In view of the fact that the instant case is limited to the question of the necessity for a prior adversary hearing before a seizure of allegedly obscene motion picture film is made, we do not reach the issue with respect to the constitutionality of Sections 1 and 3.

4/ Art. 127 §13, Texas Penal Code (Tex. Laws 1969, ch. 468, §1, at 1550-51), which provides for the seizure of film only after an adversary determination that it was obscene and that its display should be enjoined. Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

5/ In addition to the possible use of the newly enacted procedures for enjoining violations of the obscenity statutes referred to infra in footnote 7(c), Section 13 see Tyrone v. Wilkinson, 294 F. Supp. 1330, 1332-1333 (E.D. Va. 1969), aff'd No. 13,192, F.2d (4th Cir. 1969), where it was suggested that the State of Virginia might utilize its statute providing procedures for obtaining a judicial determination that a particular book or motion picture film was obscene. The Virginia statutory procedure was originally enacted for the purpose of easing the state's burden of proving scienter in a criminal obscenity case involving an alleged violation subsequent to the determination that the film or book was obscene, see 4 Code of Va. §18.1-236.3 and §18.1-236.4 (1950); but the court indicated that it might be a procedure useful in affording an adversary hearing prior to seizure of allegedly obscene motion picture film.

6/ In State v. A Quantity of Copies of Books, 197 Kan. 306, 416 P.2d 703 (1966), reversed on other grounds, 388 U.S. 452 (1967), it was indicated that after the Supreme Court decision in Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964), the State of Kansas found useful the device of a court order directed to the owners of allegedly obscene books to show cause why a warrant for seizure of the books should not issue.

Section 6 of Article 527 (and Section 13 of Article 527 as amended on June 10, 1969), granting state district judges authority to issue any "writs and processes appropriate to carry out the provisions of [Article 527]", apparently presents additional possibilities for court orders to prohibit the film on display from being altered or removed from the court's jurisdiction pending the holding of an adversary hearing; and/or to require the delivery of a print of the film to the district attorney for use in the trials or preparation for trials of criminal cases involving such film; and/or to entertain contempt proceedings against those failing to comply with such orders. See Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968).

7/ (a) The Texas statutes relating to search warrants are found in Article 18.01, et seq. of Vernon's Annotated Texas Code of Criminal Procedure. Although they provide, among other things, that the warrant shall be executed "without delay" and "forthwith" returned to the magistrate (Art. 18.14), who "shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him" (Art. 18.25), there is no provision in any of those statutes for a **prior** adversary hearing in any kind of case.

(b) As in Tyrone v. Wilkinson, supra, footnote 5, our holding does not imply that the adversary hearing "must be a fully matured action at law . . . . But in whatever form, the procedure must be 'designed to focus searchingly on the question of obscenity' ", the Court having quoted from Marcus v. Search Warrant, 367 U.S. 717, 732 (1961). See also: Freedman v. Maryland, 380 U.S. 51, 60.

(c) It is significant to note that, effective June 10, 1969, Article 527 was revised by the Texas Legislature to provide in Section 9 guidelines for seizure, when necessary and practical, of allegedly obscene matter; and it establishes in Section 13 a procedure whereby restraining orders or injunctions may be issued to prevent a person from violating the statute. The pertinent parts of Article 527, as revised, are as follows:

> Section 1. DEFINITIONS. As used in this Article:
> (a) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.
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> Section 3. GENERAL SALE OR DISTRIBUTION, ETC., OF OBSCENE MATTER: PENALTY. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.
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> Section 9. SEIZURE OF OBSCENE MATTER AUTHORIZED. Where possible and practical, obscene matter upon which prosecutions are based under the provisions of this article, should be obtained by peace officers or prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant. Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized. Moreover, no peace officer shall seize any obscene matter from the possession of any person except under the authority of a search warrant issued under the provisions of the Code of Criminal Procedure of Texas. Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing magistrate the opportunity to examine such materials to assist him in deciding whether the warrant

shall issue. Where the alleged obscene matter is not available to present to the magistrate, the affiant or affiants to the complaint shall describe the alleged obscene materials in detail so as to assist the magistrate in deciding whether the warrant should issue. Moreover, where alleged obscene matter is not attached to the complaint, as in the case of motion pictures or statues, the magistrate to whom the complaint is presented shall, where practical, personally view the matter alleged to be obscene before issuing the warrant. Where a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers. Nothing contained in this section shall prevent the obtaining of alleged obscene matter under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

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Section 13. ENFORCEMENT BY INJUNCTION, ETC. The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, or the attorney general to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was bought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

However, Section 9 of the revised Act still does not require a **prior** adversary hearing before the issuance of a search warrant in any kind of case. Even though the revised Act is not directly before this Court, it does appear that defendants should consider that the prohibition against utilizing the provisions of Section 6 of the prior statute, "unless a prior adversary hearing is afforded the party against whom 'any . . . writs and processes', including, but not limited to, search warrants, 'appropriate to carry out and enforce . . . this Act', are sought", would apply equally to Section 9 of the revised Act.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICHARD FONTAINE

V

CIVIL ACTION NO. SA69CA136

PRESTON DIAL and
BILLY CUNNINGHAM

JUDGMENT

This cause came on for hearing before the Court upon the Complaint, First Amended Original Complaint and First Amendment to Plaintiff's First Amended Original Complaint, the Answer of Defendants, the Stipulations, proposed conclusions of law and representations made by counsel at the pre-trial conference; the pre-trial order, the testimony in open court and the statement of counsel, from all of which it appeared to the Court that the cause involved only one contested issue of law which was whether or not the Constitution of the United States requires that an adversary hearing to determine the question of obscenity be held prior to the seizure of allegedly obscene motion picture films and the advertisements thereof. The Court finds that on May 6, 1969, May 26, 1969, and June 5, 1969, a search warrant was issued directing the seizure of a specifically named motion picture film, trailers and posters from the theatre at which the plaintiff was manager. The pleadings, stipulations and entire record point out that there was no prior adversary hearing on the issue of obscenity before the warrants were issued by the Magistrate and no such adversary hearing was requested by the defendants prior to seizure. The Court finds that the procedures used by the defendants in seizing the motion picture

films are unconstitutional, that the seized materials should be returned to the plaintiff and defendants should be prohibited from utilizing Section 6 of Article 527 of the Texas Penal Code, as amended Acts 1961, 57th Leg., p. 1041, ch. 461, unless a prior adversary hearing is afforded the party against whom any writ and processes, including, but not limited to search warrants, appropriate to carry out and enforce said statute are sought.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the procedures used by the defendants in seizing the motion picture films, trailers and display posters be and are hereby declared unconstitutional, and that the defendants are permanently enjoined from retaining in their possession the seized materials, which will be returned to plaintiff, and that defendants are further permanently enjoined from utilizing Section 6, Article 527, Texas Penal Code, as amended Acts 1961, 57th Leg., p. 1041, Ch. 461, unless a prior adversary hearing is afforded the party against whom any writs and processes, including, but not limited to, search warrants, are sought.

If an appeal is timely taken from this judgment granting the injunctions, it is further ORDERED, ADJUDGED AND DECREED that injunctions are suspended during the pendency of the appeal.

ARMAN A. SMEARS
Judge

APPROVED

PATTERSON GRAVES, JR.
Attorney for Plaintiff

PRESTON H. DIAL, JR.
Attorneys for Defendants